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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
and THEODORE B. GOULD,
Petitioners,

v.

BANK OF NEW YORK,
and FRED STANTON SMITH,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

STUART E. SEIGEL
KENT A. YALOWITZ
65 East 55th Street
New York, New York 10022
(212) 750-5050

Attorneys for Petitioners Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

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QUESTIONS PRESENTED

May the Bankruptcy Code's statutorily created version of the "mootness doctrine" (11 U.S.C. § 363(m))—which precludes effective appellate review of certain orders in bankruptcy cases unless a stay has been obtained—be extended by analogy to orders to which the statute does not by its terms apply?

If so, may the statute's policy considerations of finality be applied without regard to the policy of preventing manifest injustice and to condone violations of express provisions of the Bankruptcy Code?

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PETITION FOR A WRIT OF CERTIORARI

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould,[1] by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

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[1] Petitioner Miami Center Corporation has no subsidiaries; its parent is petitioner Holywell Corporation, which has no parent corporations or subsidiaries other than wholly owned subsidiaries. No other petitioner is a corporation. *See* S. Ct. R. 29.1.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. at 1a-2a) is unreported. The opinion of the district court (App. at 3a-9a) is unreported. The bankruptcy court's judgment (App. at 10a-11a) was not supported by an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991 (App. at 1a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

1. Section 363 of the Bankruptcy Code of 1978, as amended, provides in part:

11 U.S.C. § 363. Use, sale or lease of property

* * * *

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

* * * *

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203 or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

* * * *

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

* * * *

2. Section 506 of the Bankruptcy Code of 1978, as amended, provides in part:

11 U.S.C. § 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

* * * *

3. Section 158 of the Judicial Code provides in part:

28 U.S.C. § 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. . . .

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

* * * *

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

STATEMENT

The Parties and the Chapter 11 Proceedings

This case arises out of chapter 11 bankruptcy proceedings filed voluntarily by each of the petitioners. In the early 1980s, petitioner Miami Center Limited Partnership ("MCLP") developed the Miami Center, a hotel, office and retail complex in Miami, Florida. Petitioners Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Gould were all partners in MCLP, as were numerous investors who were unaffiliated with the debtors. Petitioner Chopin Associates owned the land upon

which the Miami Center was built. Respondent The Bank of New York ("BNY") was the lead construction mortgage lender to MCLP on the Miami Center project. The principal amount loaned by BNY was approximately $196.7 million.[2]

On August 22, 1984, each of the petitioners voluntarily commenced chapter 11 bankruptcy proceedings. As of the date of the filing of the bankruptcy petitions, BNY filed a proof of claim for $218.7 million in principal and interest; BNY reserved its rights to claim interest on its loans for the period following the filing of the petition ("post-petition interest") to the extent it was permitted by law.[3] BNY's security interest in the Miami Center was not the senior lien on the property: it was subordinate to various tax liens, mechanics' liens and encumbrances for ground rent. *See* pp. 24-25 & n.21, *infra.*

The "Reorganization" Plan

In February 1985, each of the debtors proposed a plan of reorganization. BNY proposed its own plan, one which its counsel later candidly referred to as a "cramdown" plan of reorganization.[4] The IRS was to be presumably one of the objects of the cramdown; BNY's Plan did not provide for the payment of taxes.[5] The Plan allowed

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[2] *See In re Holywell Corp. (Holywell Corp.* v. *Bank of New York)*, 901 F.2d 931, 931 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991).

[3] Section 506 of the Bankruptcy Code permits a secured creditor to recover (from the secured property) interest and other expenses that accrue after the filing of a bankruptcy petition only "to the extent" that the value of the property securing the claim exceeds the claim itself plus administrative expenses necessary to preserve the secured property. *See* pp. 24-25, *infra.*

[4] *See* F. Carter, "Orchestrating and Implementing a Successful Creditors' Plan," *The Bankruptcy Strategist* 3-4 (February 1987).

[5] *See In re Holywell Corp. (Smith* v. *United States)*, 911 F.2d 1539, 1542 (11th Cir. 1990), *petitions for cert. filed*, Nos. 90-1361 (*sub nom. Holywell Corp.* v. *Smith*) (filed February 28, 1991), 90-1484 (*sub nom. United States* v. *Smith*) (filed March 20, 1991).

BNY to recover 100 cents on the dollar and also to recover 100 cents on the dollar for both prepetition and postpetition interest. Amended Consolidated Plan of Reorganization Proposed by the Bank of New York § IV(a) (filed March 26, 1985) (Bankr. C.P. No. 479).

The Plan called for a "modified form" of substantive consolidation of the debtors' estates, requiring the payment of Holywell's liabilities prior to the use of its assets to pay claims against other debtors,[6] and the establishment of a so-called "liquidating trust." 85 Bankr. at 900. The properties transferred to the trust consisted of all the debtors' assets as defined in 11 U.S.C. § 541(a) (Supp. II 1984), and the trustee was vested with title to and control over all of that property. 85 Bankr. at 900. The court appointed Respondent Fred Stanton Smith as trustee under the terms of the Plan.[7]

The Plan's central feature was the trustee's sale of the Miami Center and other properties to BNY's designee for a price of $255.6 million. *See Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d at 1549 (hereinafter "*Miami Center*").

BNY's Plan contained a number of glaring omissions. Most astonishingly, it did not provide for the payment

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[6] Order on Substantive Consolidation (Bankr. S.D. Fla. July 23, 1985) (Bankr. C.P. No. 840); Transcript of Decision from the Bench on Substantive Consolidation (Bankr. S.D. Fla. July 18, 1985) at 96-97 (Bankr. C.P. No. 829).

[7] In order to ensure implementation of the Plan, the trustee was provided with a full panoply of powers over the debtors' properties, including, among other things, the authority to "[d]eal with the Trust Property or any part or parts thereof in all ways as would be lawful for any person owning the same to deal therewith . . . ." *See In re Holywell Corp. (Smith* v. *United States)*, 911 F.2d at 1542 n.2; *see also* Appendix to Petition for a Writ of Certiorari ("Pet. No. 90-1361 App.") in *Holywell Corp.* v. *Smith*, No. 90-1361, at 42a-46a (setting out portions of the Plan).

of federal income taxes.[8] Whether the trustee had, as a matter of law, to pay such taxes was the subject of a subsequent adversary proceeding (the "tax case"). In the tax case, the courts below concluded that the trustee was not obligated to pay the federal taxes on the liquidation process. The debtors and the Solicitor General have now brought that unprecedented conclusion before this Court on Petitions for Writs of Certiorari (Nos. 90-1361 (filed February 28, 1991); 90-1484 (filed March 20, 1991)). To this day, the federal taxes remain unpaid.

In addition, although the bankruptcy court (in its memorandum order confirming the Plan dated August 8, 1985) had described BNY's claim as "undersecured and hopelessly in default," App. at 12a; 54 Bankr. at 42, the Plan provided for the payment of postpetition interest to BNY. As we explain below, an undersecured creditor is not entitled to carve postpetition interest out of the property held as security. *See* pp. 24-25 & n.21,

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[8] *See In re Holywell Corp. (Smith* v. *United States)*, 911 F.2d at 1542. The tax liabilities in question arise primarily from two sources: (1) the trust's post-confirmation earnings over the last five years, consisting of interest and other taxable items, which now total more than $19.7 million; and (2) the taxable gain realized when the trustee sold the Miami Center. MCLP had a number of investor limited partners who were, of course, not themselves in bankruptcy. MCLP continued to file information returns as a partnership, and its returns were the subject of an audit by the Internal Revenue Service. According to the Service's final report on its examination of MCLP (dated September 6, 1989), the trustee's sale of the Miami Center resulted in a net taxable gain attributable to the partnership interests of Holywell and MCC of approximately $58.7 million and a net ordinary loss attributable to the partnership interests of Holywell and MCC of approximately $19.9 million; the sale also resulted in a net taxable gain attributable to Gould's partnership interest of approximately $18.98 million and a net ordinary loss attributable to Gould's partnership interest of approximately $6.4 million. *See* the Petition in No. 90-1361 at 6 n.5. In addition, the Service is currently conducting an audit of Holywell Corporation to determine the amount of tax liabilities arising from these bankruptcy proceedings.

infra. Notwithstanding the silence as to responsibility for taxes and the glaring violation of the Bankruptcy Code as to payment of postpetition interest, the Plan was confirmed, over the debtors' objections, by the bankruptcy court in an order dated August 8, 1985.[9]

Proceedings on Appeal of the Confirmation Order

The bankruptcy court's memorandum opinion rejected most of the debtors' objections without discussion. App. at 12a-16a; 54 Bankr. at 41-43. The debtors appealed the confirmation of the Plan to the district court. They were unable to post the $140 million supersedeas bond set by the bankruptcy court, and therefore no stay was entered. *See* App. at 4a.

On October 10, 1985, the Plan was consummated while appeal of the confirmation order was pending in the district court. The debtors did not participate in and were not represented at the October 10, 1985, closing of the sale of the Miami Center to BNY's designee—a trust controlled by BNY and the creditors' committees. BNY drafted the closing statement. At the closing, a number of "closing adjustments" were made to the purchase price, the most significant of which was a credit to BNY of more than $27 million representing postpetition interest.

On appeal of the confirmation order, the district court rejected BNY's argument that the debtors' appeal was moot (although the Plan had in fact by then been consummated by the trustee's sale of the Miami Center to an entity controlled by BNY and its co-lenders on the Miami Center project) and remanded the case so that the bankruptcy court could enter additional findings of

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[9] App. at 12a-16a; *In re Holywell Corp.*, 54 Bankr. 41, 42-43, *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *appeal dismissed sub nom. Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

fact and conclusions of law. *See* 59 Bankr. at 344. On January 29, 1986, on remand, the bankruptcy court adopted verbatim a set of "findings" proposed by BNY. *See Miami Center*, 838 F.2d at 1551 n.4. Those findings do not contain any discussion about the extent and value of BNY's security interest in the Miami Center properties.[10]

Earlier, in January 1986, shortly before the bankruptcy court adopted BNY's "findings," the district court heard argument on an "emergency motion" by BNY concerning the validity of its title to the Miami Center. BNY's counsel (Mr. Salter) and the district judge discussed the bankruptcy court's finding in the August 8, 1985, confirmation order that BNY was "undersecured," and Mr. Salter explained why BNY was in fact undersecured. The district judge asked Mr. Salter, concerning the appraised value of the property and the value of BNY's cash collateral, "have you taken all that into account when you . . . say the Bank is undersecured?"

"Yes, sir," answered Mr. Salter, "Yes, indeed." He then went on to explain that BNY's collateral was subordinate to various superior encumbrances, including "the amount of the unpaid taxes." Transcript of Oral Ar-

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[10] Findings of Fact and Conclusions of Law Upon Remand (Proposed by BNY January 23, 1986; adopted *in toto* January 29, 1986) (Bankr. C.P. Nos. 1176, 1188). The findings do refer to an earlier judgment by that court that BNY held a *lien* in the amount of $234.3 million plus interest from March 15, 1985 (*id.* ¶ 18), but that judgment in no way purported to evaluate the extent and value of BNY's security interest, which could not have been determined until all liens superior to that of BNY under applicable non-bankruptcy law were accounted for and the value of the Miami Center itself had been established. *See* pp. 24-25, *infra*. Obviously, the fair market value of the Miami Center could not have been established until consummation of the sale; and even then it was necessary to use an appraisal, because the sale under the Plan was not at arms' length but was to the nominee of BNY, the principal secured creditor. *Id.*

gument, Case No. 85-3225 (S.D. Fla. January 10, 1986); *see* App. at 6a.

Following the bankruptcy court's entry of further findings and conclusions relating to the confirmation of the Plan, the district court affirmed the bankruptcy court's confirmation order on the merits. 59 Bankr. 340. On further appeal of the confirmation order, the Eleventh Circuit held that the case was moot and vacated the district court's judgment. *Miami Center*, 838 F.2d at 1558.[11] The court of appeals did not hold that the case was moot because there was no longer a case or controversy in the constitutional sense. Neither did it hold that the case was moot because of the Bankruptcy Code's statutory preclusion of appellate review of certain orders in the absence of a stay. Indeed, the court of appeals acknowledged that that statute, 11 U.S.C. § 363(m), was inapplicable to this case. 838 F.2d at 1553.

Instead, the court of appeals' decision not to review the confirmation order rested on a sort of "common law" or judge-made expansion of the statutory preclusion. The court of appeals held that "considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale" precluded review. 838 F.2d at 1553 (quoting *In re Matos*, 790 F.2d 864, 865-66 (11th Cir. 1986)).

The court distinguished an earlier case in which it had remanded for a determination of "whether the bankrupt estate was entitled to [the] excess, if any, of the foreclosure bid over the debt." 838 F.2d at 1553 (discussing *Markstein* v. *Massey Assocs.*, 763 F.2d 1325

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[11] Actually, the Eleventh Circuit first held that the *appeal to it* of the confirmation order should be dismissed as moot. 820 F.2d 376 (11th Cir. 1987). Then, on rehearing, the Eleventh Circuit adhered to its earlier mootness ruling but corrected a factual misstatement in its original opinion. 826 F.2d 1010 (11th Cir. 1987). Finally, on a second petition for rehearing, the Eleventh Circuit held that the appeals to it *and* to the district court should be dismissed as moot.

(11th Cir. 1985)). The court noted that the case before it turned on its "lack of power" to "rescind [a] sale where there has been no stay," not on whether adjustments should be made to the purchase price, as in the *Markstein* case. 838 F.2d at 1553.[12] In holding itself powerless to deal with the matter before it, the court stressed that reversing the confirmation order would deny BNY the benefit of its "bargain" and would "strike at the sale to the bank and the reorganization plan as a whole." 838 F.2d at 1556. This Court denied certiorari. As is often the situation in bankruptcy cases, a number of "adversary proceedings" continued, or were later instituted, in the bankruptcy court.[13]

This Proceeding

The liquidating trustee—concerned that BNY had taken the $27 million credit for postpetition interest despite the bankruptcy court's statement in its August 8, 1985, confirmation order that BNY was undersecured—commenced an adversary proceeding against BNY and the debtors on October 28, 1987, to resolve whether BNY was oversecured or undersecured (the "postpetition interest case"). At the time the trustee brought the ad-

[12] Oddly enough, in its earlier, first opinion on rehearing, the court, in correcting its opinion by stating that neither of the lower courts found that the project was sold to a "good faith" purchaser, had observed that this "does not affect our conclusion because debtors do not challenge the sale of the project or seek reconveyance of the project." 826 F.2d 1010.

[13] Adversary proceedings are conducted by the bankruptcy court to resolve certain kinds of contested issues arising during the course of the bankruptcy case. For example, a case removed to bankruptcy court pursuant to 28 U.S.C. § 1452 is an adversary proceeding, as is a proceeding to determine an interest in property. *See* Bankr. R. 7001. Because adversary proceedings may continue beyond the confirmation of a reorganization plan, they must often be appealed separately. The Plan of Reorganization provided for the retention of jurisdiction by the bankruptcy court. Pet. No. 90-1361 App. at 46a.

versary proceeding, the Eleventh Circuit had already held that the appeal of the confirmation order should be dismissed as moot, 820 F.2d 376 (entered June 29, 1987), and had adhered to that determination on rehearing. 826 F.2d 1010 (entered September 8, 1987). The trustee was not challenging the confirmation of the Plan or the sale of the property; he was focussing on the taking of the credit for $27 million in postpetition interest by BNY. The trustee sought a resolution of the issue whether BNY was undersecured, and explained in his complaint that he and BNY took the position that BNY was entitled to receive the $27 million credit against the purchase price for postpetition interest. Adversary Complaint (filed October 28, 1987) ¶ 13. The case was thus an express attempt by the trustee to obtain a judicial resolution of several disputes over "post-closing adjustments required under the Contract" including the $27 million credit, *id.* ¶¶ 9, 12, and was not affected by the court of appeals' determination that the sale itself could not be challenged.

The complaint alleged that the bankruptcy court's statement on August 8, 1985, as part of its order confirming the Plan, that BNY was undersecured (App. at 12a; 54 Bankr. at 42) "does not refer to a finding of fact or evidence in the record as support for that conclusion." Adversary Complaint ¶ 16. Indeed, the Adversary Complaint omitted to state that the later findings of fact and conclusions of law entered on remand from the district court were written by BNY, and that they contained no conclusions, findings or analysis as to whether BNY's claim was oversecured or undersecured.[14]

The bankruptcy court did not see fit to make any findings of fact in response to the trustee's desire to have the issue of oversecurity or undersecurity resolved in this

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[14] As we demonstrate below, *see* pp. 24-27, *infra*, there is no question that BNY's claim was, in fact, undersecured.

adversary proceeding. Instead, its findings of fact and conclusions of law consisted of a lone, unsupported statement completely contradictory of its earlier ruling of August 8, 1985: "The Bank was not an undersecured creditor in these reorganization proceedings." App. at 11a.

The debtors appealed. On appeal, the district court expressed considerable scepticism about the underlying legality of BNY's having taken a credit for postpetition interest at the closing of the sale of the Miami Center. The district court focused particularly on concessions by BNY's counsel and the trustee's counsel [15] that BNY was undersecured. App. at 6a-7a. As the district court observed, BNY's counsel, Mr. Salter, expressly acknowledged to the district court on January 10, 1986, that he had taken "all relevant factors into account" in concluding that BNY was undersecured. *Id.*

Notwithstanding the district court's concern that BNY unlawfully took a closing adjustment of $27 million—money that could have otherwise been used to satisfy federal tax obligations—the district court felt bound by the confirmation order. The district court therefore held that, applying 11 U.S.C. § 363(m) by analogy, not only the validity of the sale of the Miami Center, but the relative claims of the principal secured creditor and other claimants to the proceeds of its sale, had become untouchable. The district court concluded:

> Whether or not BONY was "entitled" to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan. . . .

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[15] The evidence was that the trustee had obtained indemnification from BNY because the Plan failed to provide for the payment of federal income taxes and because of the conflict between the bankruptcy court's August 8, 1985, finding of undersecurity and the $27 million credit. *See* App. at 7a.

> Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered.

App. at 8a. The district court therefore remanded the postpetition interest case with instructions that the bankruptcy court's order be vacated. App. at 9a.

The debtors appealed. The court of appeals disposed of five separate appeals by the debtors on the same day in a series of summary, *per curiam* opinions; it held that this case was controlled by its earlier decision on the appeal of the confirmation order in *Miami Center*, 838 F.2d 1544. It did not allude to its prior discussion in that decision of the *Markstein* case (*see* pp. 10-11, *supra*), which held that issues of closing adjustments to the distribution of the purchase price were not mooted by the consummation of a sale. Neither did the court of appeals focus on the fact that its decision holding the appeal of the confirmation order to be moot was premised on the position that the sale of the Miami Center itself could not be set aside, nor on the fact that the present case related only to the closing adjustments.

All that the court of appeals said was that the $27 million credit "was part of the now substantially consummated plan of reorganization, and appellants' challenge thus is moot." App. at 2a. It went on to characterize the five appeals (without discussion or differentiation among them) as "wholly lacking in merit" and "frivolous." *Id.*

REASONS FOR GRANTING THE WRIT

This case raises important issues under the bankruptcy laws, over which the courts of appeals have reached conflicting results. The court of appeals' ruling in this case insulates from judicial review an admittedly unlawful distribution of the proceeds from the sale of an insolvent debtor's property. It does so without direction from the Constitution or Congress that review may not be had; instead, the court of appeals' decision was based solely on "considerations of finality" that amount to a refusal to correct a manifest injustice based on nothing more than judicial fiat.

No argument is made that this case fits within the traditional mootness framework: the controversy between the parties had not been settled or otherwise "mooted" in the usual sense, so as to make further adjudication offend the Article III requirement that the federal courts decide only "Cases" and "Controversies." *See DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The "usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review," *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), is fully met here, and no one could argue otherwise.

Nor is there any argument that Congress by statute has expressly precluded the district courts or the courts of appeals from exercising jurisdiction or providing relief in this case. *Cf. Lockerty* v. *Phillips*, 319 U.S. 182, 187-89 (1943); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 512-14 (1869). The only arguably relevant statute, 11 U.S.C. § 363(m), prohibits effective appellate review of certain orders where a stay has not been obtained. Section 363(m), however, is, on its face, inapplicable. *See* p. 18, *infra*.

The decision thus raises two separate, important issues affecting the administration of the bankruptcy laws.

First, it improperly extends the limited statutory preclusion of appellate review in bankruptcy cases, thereby insulating from all judicial review cases that Congress intended to be subject to review. *See* pp. 17-20, *infra*. Second, if the statute may be extended by analogy, its policy favoring finality may not be extended without regard to the courts' duty to prevent injustice. The decision did not weigh (or even discuss) policies embodied in section 503(b)(1)(B)(i) of the Bankruptcy Code itself and in other statutes expressing Congress' unmistakable intent that federal taxes on the liquidation process be paid. By applying only the "policies" embodied in section 363(m)—and those beyond the letter and intent of that section—the court of appeals has eviscerated the ability to obtain funds to pay federal income taxes, thereby allowing a manifest injustice to be perpetrated. *See* pp. 20-24, 27-29, *infra*.

The court of appeals reached this result as the last step in a procedural history that must cause concern as to the proper administration of justice. When the confirmation order first came before the court of appeals for appellate review, the only finding of record as to whether BNY was in fact undersecured was the bankruptcy court's August 8, 1985, finding that BNY was undersecured. This finding was in accordance with statements later made by counsel for BNY before the district court that BNY was undersecured. The court of appeals never reached the merits of the confirmation order but instead held that the appeal to it (or, in the final version of its opinion, to the district court) was moot. This was because the sale had by then been consummated, since the debtors could not put up a multimillion dollar bond in order to stay the confirmation order.

After confirmation (and after dismissal by the court of appeals of the debtors' appeal of the confirmation order), proceedings were held in the bankruptcy court at the instance of the trustee to determine whether the $27

million credit was appropriate. The bankruptcy court, without a word of explanation as to its change of position, and without any findings or analysis, concluded that BNY was not undersecured. The district court, expressing extreme scepticism as to this conclusion, particularly in the light of representations previously made to it in open court by BNY's counsel, nonetheless in effect upheld the bankruptcy court's decision by applying the "mootness" doctrine by vacating the bankruptcy court's order as moot. The court of appeals then reached the same result by directing that the appeal to it from the district court be dismissed as moot.

Throughout this bizarre procedural history, there has never been any determination by any Article III judge on the merits that the taking of the $27 million credit was appropriate, and the only decision to that effect, the bankruptcy court's order of December 18, 1987—inexplicably contradicting its prior order and not supported by findings or analysis—has been vacated by an Article III court. Nonetheless, BNY has received, and retains, the $27 million credit, the taking of which is contrary to the statutes.[16]

I. SECTION 363(m) MAY NOT BE EXPANDED BY THE COURTS.

Congress has determined that "[t]he courts of appeals shall have jurisdiction of appeals from *all* final decisions, judgments, orders, and decrees" entered in bankruptcy

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[16] This Court's precedents going back over a century make it clear that the courts are not to implement a contract that is void in law. *See, e.g., Bank of United States* v. *Owens*, 27 U.S. (2 Pet.) 527, 538-39 (1829). *See also United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) ("a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment"). This principle would apply even more strongly to a plan confirmed over objection than to a binding contract signed by all parties.

cases. 28 U.S.C. § 158(d) (emphasis added). Section 158 also uses mandatory language in describing the appellate jurisdiction of the district courts and of bankruptcy appellate panels over orders of the bankruptcy courts. 28 U.S.C. §§ 158(a), 158(b).

Thus Congress has established a system that requires: (1) exclusive district court jurisdiction of bankruptcy cases, which are ordinarily referred to the bankruptcy court;[17] (2) appellate review in the first instance either by a district judge or a bankruptcy appellate panel; and (3) thereafter appellate review of *all* cases in the courts of appeals. The mandatory language of the statute ("shall have jurisdiction" over "all" appeals) indicates a clear intent that judicial review should not be precluded except in the most limited circumstances—circumstances that Congress has defined by statute.

There are only two provisions in the Bankruptcy Code precluding appellate review in the absence of a stay: section 363(m) and section 364(e).[18] Under section 363(m), a sale like the one here would be insulated from appellate review only if it were made by a trustee (or the debtor-in-possession) after notice and a public hearing on the proposed sale during the course of the bankruptcy case and under the auspices of section 363(b). The closing adjustments at issue here were not subject to the notice and hearing process contemplated in section 363: once the Plan was confirmed, the "liquidating trustee" had complete control over the debtor's property and had no need for (and indeed did not seek) the court's advance approval of the various adjustments taken upon the consummation of the sale. (He did, however, receive an indemnity from BNY because of his concern that some such

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[17] 28 U.S.C. §§ 157(a), 1334.

[18] Section 364(e)—which relates to authorizations under section 364 to obtain credit or incur debt—is clearly inapplicable to this case even by any form of analogy.

adjustments were unlawful, App. at 7a.) Therefore the purchaser of the Miami Center (which was controlled by BNY and the other lenders on the construction mortgages), could not have relied on the cloud-lifting effect normally understood to accompany a court-supervised sale when they took the closing adjustments. Indeed, BNY and the court of appeals have both acknowledged that "[s]ection 363(m) does not apply to sales by a liquidating trustee pursuant to a plan of liquidation." *Miami Center*, 838 F.2d at 1553. In this absence of congressional direction to the contrary, judicial review should not be precluded based on generalized policy considerations of finality.

Although some judges and courts have expressed the view that precluding review in cases where sections 363(m) and 364(e) do not apply will enhance the value of bankruptcy estates being liquidated,[19] Congress made its view clear that only a limited class of bankruptcy transactions was to be insulated from appellate review. That policy decision must be left with Congress.

Absent exceptional circumstances, "the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)); *see England* v. *Louisiana State Bd. of Medical Examiners*, 376 U.S. 411, 415 (1964); *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1824). As Justice Brennan explained in *Colorado River*, "only the clearest of justifications" warrant a federal court's decision to decline to exercise the jurisdiction provided by Congress. 424 U.S. at 819. Such justifications include,

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[19] *See, e.g., In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1095 (3d Cir. 1990) (Sloviter, J., dissenting); *In re Stadium Mgt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990).

for example, a clear expression of Congressional intent that jurisdiction should not be exercised—as in *Colorado River* itself, as well as cases controlled by the language of statutes that preclude judicial review. *E.g.*, *Lockerty* v. *Phillips*, 319 U.S. at 187-89; *Ex Parte McCardle*, 74 U.S. (7 Wall.) at 512-14.[20] Here, however, Congress has expressed its intent that the courts shall exercise jurisdiction over "all" bankruptcy cases, 28 U.S.C. §§ 158(d), 1334, and carved out only two limited exceptions.

One court of appeals has recently declined to follow the Eleventh Circuit's decision to extend the "principles of finality" embodied in sections 363(m) and 364(e) to transactions that do not come within their express ambit. *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1084 (3d Cir. 1990). In fact, the dissent in that case relied expressly on the reasoning and language of the Eleventh Circuit's decision on appeal of the confirmation order in *Miami Center*, 838 F.2d at 1553—the same opinion that the Eleventh Circuit held controlling in this case. Nevertheless, the majority in *Joshua Slocum Ltd.* rejected the dissent's argument that the court should fashion a "judicial doctrine" based on "the particular need for finality in orders regarding stays in bankruptcy." 922 F.2d at 1095. Noting that "only two provisions of the Bankruptcy Code . . . specifically require that a party seek a stay pending appeal," the majority declined to "create a third situation where parties are required to seek a stay . . . ." 922 F.2d at 1084.

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[20] Similarly, "considerations of proper constitutional adjudication and regard for federal-state relations" require the federal courts to abstain from deciding some cases (*Colorado River*, 424 U.S. at 817), although none of the abstention doctrines is implicated by this case.

II. EVEN IF SECTION 363(m) MAY BE EXTENDED BY ANALOGY, THE DECISION BELOW IGNORES FACTORS THAT HAVE DISSUADED OTHER COURTS FROM CONSIDERING SUCH AN EXTENSION.

The extension of the "mootness" doctrine beyond its statutory parameters in the Bankruptcy Code involves a manifest inequity that should lead this Court to be sparing in sanctioning its extension. The doctrine means that only those who can pay can obtain appellate review. The condition on being permitted an appeal is the obtaining of a supersedeas bond to halt the effectiveness of the judgment appealed from, and thus to prevent the consummation of the action permitted by the order appealed from. *See* Bankr. R. 8005. Supersedeas bonds cost money, and if the party applying for a bond is not creditworthy, the bond will have to be fully collateralized by the applicant with the surety company. Surety companies are not charitable organizations and they are not running a legal aid society. By definition, as a class, debtors in bankruptcy cases are apt to be corporations or individuals that are not creditworthy. That is why they are debtors in bankruptcy cases. The decision of the court of appeals here added to those provided by Congress an additional class of cases where judicial review is available only to those who have sufficient funds to put up a large supersedeas bond. It is no surprise that, having been stripped of their assets, the debtors could not post the $140 million bond set by the bankruptcy court, or even the $50 million set by the district court. *See* App. at 4a.

To apply such a doctrine beyond the narrow scope in which Congress here expressly provided for it—specific cases where the interests of third-party purchasers are apt to be put at risk—raises such fundamental questions that this Court's attention is warranted. This is not a case of a sale of the debtor's property pursuant to an unstayed order, where the third party may lose the bene-

fit of his bargain and what he has bought and paid for if appellate review is permitted despite the consummation of the sale. Rather, the liquidating trustee's adversary complaint related to the application of the proceeds of a sale by the liquidating trustee himself of the debtors' major asset, not to a third party, but for all intents and purposes to the Plan's proponent. And here there is no attempt to set aside the sale, but simply to deal with the proceeds in a way consistent with the law.

Furthermore, by making the bond upon appeal of the confirmation order a prerequisite of any subsequent judicial review, the court of appeals has allowed a manifest injustice to go uncorrected: an undersecured creditor has enriched itself at the expense of the public fisc and without fear of judicial review. It has taken credit for $27 million that otherwise would have gone to the liquidating trust, and—if our and the Solicitor General's Petitions in Nos. 90-1361 and 90-1484 are well founded—would have been available to pay capital gains and other income taxes. This, too, is an important issue in the administration of bankruptcy cases. This Court has recognized that a judgment may be reexamined years after it has been entered "whenever such action is appropriate to accomplish justice." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949)). Surely if a court must consider the interests of justice in determining whether to *reopen* a judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, such considerations must also be taken into account in determining whether to apply a common law rule precluding appellate review of a judgment in the ordinary course.

Other courts of appeals have in fact taken such considerations into account when applying the "mootness" doctrine. For example, the District of Columbia Circuit concluded that an appeal to it was not moot, inasmuch as all the necessary parties were before the court and the

court was able to fashion effective relief. The D.C. Circuit applied a standard articulated by the Ninth Circuit: is the court faced with a situation where the plan "has been so far implemented that *'it is impossible to fashion effective relief for all concerned?'*" *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986) (quoting *In re Roberts Farms*, 652 F.2d 793, 797 (9th Cir. 1981)) (emphasis by the *AOV* court). In the D.C. Circuit's view, the dispositive issues are whether the trustee remains subject to the control of the plan and whether the other parties necessary for effective relief remain subject to the power of the court: "[w]hile much of the debtor's property has been liquidated, and many of the creditors have been paid, the plan still controls the actions of the trustee." 792 F.2d at 1148 (quoting *In re Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977)).

Here, all parties continue to be before the court: nothing prevents the court from ordering disgorgement, restitution or other equitable relief. In one aspect of the appeal in the D.C. Circuit, for example, the debtors challenged the behavior of a law firm representing the proponent of the plan of reorganization. "Were this court to rule favorably on [the] conflict of interest allegations," the D.C. Circuit held, "one possible remedy would be to order the law firm to make partial or total restitution of these payments to the Debtor's estate for redistribution to the creditors." *In re AOV Indus.*, 792 F.2d at 1149. Similarly, the Sixth Circuit has recognized the inapplicability of former Bankruptcy Rule 805 (the predecessor to 11 U.S.C. §§ 363(m) and 364(e)) where an appellant was seeking disgorgement of money taken from it pursuant to an unlawful court order. *Ohio* v. *Madeline Marie Nursing Homes*, 694 F.2d 449, 463 (6th Cir. 1982).

In short, the Third Circuit, declining to follow the holding of the Eleventh Circuit, has refused to expand the so-called "mootness doctrine" in the absence of congres-

sional direction to do so. Other Circuits, including the D.C. Circuit, the Ninth Circuit and the Sixth Circuit, have applied the "mootness doctrine" on a case-by-case basis taking into account the interests of justice. The Eleventh Circuit, however, has held the "mootness doctrine" to be a flat preclusion of any sort of judicial review following substantial consummation of a reorganization plan. This Court should resolve that conflict, and, in doing so, reaffirm the duty of the district courts and courts of appeals to hear appeals in bankruptcy cases unless *Congress* has decided that no such appeals may be had.

III. THAT BNY'S CLAIM WAS UNDERSECURED CANNOT NOW BE DENIED.

On August 8, 1985, when it confirmed the Plan, the bankruptcy court stated in its confirmation order that BNY's claim was "undersecured." 54 Bankr. at 42.

When, in January 1986, the district judge who later was to hear the appeal of the present adversary proceeding questioned BNY's counsel about this statement by the bankruptcy court, counsel confirmed that "[y]es, indeed," BNY was undersecured—and explained why that was true. *See* pp. 9-10, *supra*; App. at 6a. That admission in open court was, without question, correct, and we set out the reasons why that is true only so that issues about whether BNY was undersecured are not speciously raised to cloud the issues on which certiorari should be granted.

In *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372-73 (1988), this Court explained the "substantive effect" of section 506 of the Bankruptcy Code—that an undersecured creditor may not recover postpetition interest from the secured property, and that an oversecured creditor may recover postpetition interest only "to the extent" that the value of the property securing a claim exceeds the claim itself plus the administrative costs of preserving the property.

In the briefs to the court of appeals in this case, the debtors demonstrated that BNY was undersecured: its security interest in the Miami Center property was less than its total claim for principal and interest including postpetition interest.[21] BNY did not dispute these figures. Instead, it contended that it had an additional $30 million worth of cash collateral that it took under the terms of the bankruptcy court's December 31, 1984, Cash Collateral Order (App. at 17a-20), leaving it with a security cushion of more than the $27 million credit it took for postpetition interest.

BNY's claim that it had a security interest in the debtors' cash and stock in Holywell's subsidiaries derives from the debtors' subsidiaries' sales of properties other than the Miami Center (known as the "Washington Properties") in 1984, during the early months of the bankruptcy proceedings. *See* App. at 17a-18a. In grant-

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[21] The bankruptcy court determined that BNY's lien totalled more than $234 million, of which approximately $218 million represented principal and prepetition interest. (Bankr. C.P. No. 21 in Adv. Pro. 85-160). The extent to which that lien was *secured*, however, was subject to two sources of limitation: the "value of the interest of the estate in the collateral"; and the "value of the interest of the creditor in such interest of the estate." 3 L. King, R. Babitt, A. Herzog & R. Levin, *Collier on Bankruptcy*, ¶ 506.04 at 506-16 (15th ed. 1990).

The value of certain leased equipment (approximately $13.5 million) in which the estate did not have an ownership interest should have been subtracted from the $255.6 million in proceeds from the sale of the Miami Center, leaving only about $242.1 as the amount of "the estate's interest" in the Miami Center. *See Collier on Bankruptcy, supra*, at 506-17 to 506-18. BNY's lien on the Miami Center was also subordinate to mechanics' liens, real estate tax liens and rental encumbrances totalling approximately $21.5 million. *See Collier on Bankruptcy, supra* at 506-19. BNY's liens, filed upon form UCC-1, acknowledged these superior encumbrances. BNY's security interest in the Miami Center properties therefore totalled approximately $220.6 million. Its lien of more than $234 million could not possibly have been completely secured by the Miami Center. *See* Appellants' Initial Brief at 30 (filed January 13, 1989).

ing BNY's emergency request that the proceeds of those sales be treated as cash collateral under 11 U.S.C. § 363 (a), the bankruptcy court expressly recognized that federal income taxes had not yet been determined or paid on the gain realized on the sales of the Washington properties, let alone on the debtors' other income, and that no source of income existed to pay those tax liabilities other than the proceeds of sales of the debtors' properties themselves. App. at 18a-19a. Thus, the bankruptcy court ruled that "BNY appears to have a first lien on the interests of Holywell and Gould in the *net* proceeds from the sale of the Washington Properties . . . ." App. at 18a (emphasis added). In light of the unpaid liabilities to the Internal Revenue Service acknowledged in the bankruptcy court's order, the reference to "*net* proceeds" could only have been a reference to after-tax proceeds.

As *Collier* explains, "a security agreement may contain a limitation on the amount of the indebtedness that may be secured by the debtor's property." *Collier on Bankruptcy, supra* at 506-19. Here, the Cash Collateral Order anticipated: (1) that the obligations of Holywell and its non-debtor subsidiaries to pay federal taxes would have to be satisfied; and (2) that no source of funds other than the proceeds of sales (the cash collateral itself) would be available to satisfy those obligations. App. at 18a-19a. The bankruptcy court therefore granted BNY a security interest only in the "net proceeds of sale" of the Washington properties, anticipating that the cash collateral would be used to wind up Holywell and its non-debtor subsidiaries and to satisfy "all obligations to the Internal Revenue Service . . . ." App. at 19a.[22] It is

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[22] Before the trustee could wind up the non-debtor subsidiaries and use their cash to pay BNY's claim, therefore, he was under an obligation to pay federal income taxes owed by Holywell and by the non-debtor subsidiaries. *See also Sampsell* v. *Imperial Paper Co.*, 313 U.S. 215, 219 (1941) ("All questions of fraudulent conveyance aside, creditors of the corporation normally would be entitled to

only by sweeping those tax obligations under the carpet—by transferring them to the supposedly reorganized debtors—that BNY can purport to hold any interest in the cash collateral.

Until the taxes are paid, the extent of BNY's security interest in the cash collateral, if any, cannot be known with certainty. However, it is clear that millions of dollars of tax liability have not been paid. *See* p. 7 n.8, *supra*.

IV. THE COURT OF APPEALS HAS GIVEN ITS IMPRIMATUR TO A MANIFEST INJUSTICE PERPETRATED BY BNY.

By hiding the federal tax liabilities in the liquidation process, BNY has succeeded in recovering every cent of principal and every cent of interest, both pre- and post-petition—indeed, interest at a rate above that provided for in its contract.[23] And by applying a statute precluding review to a situation to which it admittedly does not apply, the court of appeals has given its blessing to this egregious abuse of the bankruptcy process.

In the related case now before the Court on Petitions for Writs of Certiorari (Nos. 90-1361, 90-1484) (the tax case), we and the Solicitor General have argued that the trustee in this case should have filed federal income tax returns and paid federal income taxes because of the commands of a number of statutes requiring him to do so. Those statutes apply universally, and do not depend on the terms of the Plan.

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satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholders."). In addition, since Holywell and its subsidiaries filed their federal income tax returns as part of a consolidated group, each non-debtor subsidiary was severally liable for the entire amount of federal taxes owed by the group. Treas. Reg. § 1.1502-6.

[23] For the mathematical error involved in this, see 901 F.2d at 933. Remarkably, the court of appeals, following its notions about the mootness doctrine, refused to do anything about this substantial mathematical error in the calculation of interest due to BNY. *Id.*

In our Petition in No. 90-1361, we also showed that the court of appeals' decision points the way to a new form of tax avoidance: instead of converting the case to a chapter 7 liquidation or leaving the debtors as debtors-in-possession to liquidate their estates under court supervision and a "liquidating chapter 11" plan, creditors will attempt to "cram down" plans like BNY's Plan in this case, providing for a "liquidating trust." The court of appeals' decision in this case goes one step further in encouraging such behavior. By sweeping under the carpet a substantial administrative expense—the payment of taxes on the capital gains realized upon the sale of the debtors' properties—the Plan speciously appeared to provide for the payment of all claims of unsecured creditors. Had taxes been included there would have been less money available to the unsecured creditors, and BNY's "credit" for the $27 million would likely have been challenged by them. Since the unsecured creditors (who were far more likely to have had the wherewithal to put up a supersedeas bond) were being paid with funds that (if we are correct in the tax case) should have gone for the payment of taxes, they had no cause for complaint and no reason to challenge BNY's behavior.

There is no dispute that if the estate had been liquidated by the debtors-in-possession under court supervision, or by a trustee elected under chapter 7, or even by a trustee appointed during the administration of the case under chapter 11 (rather than by a so-called "liquidating trustee"), the capital gains taxes and other income taxes on income earned by the trustee would have been entitled to first priority as administrative expenses. *See* 11 U.S.C. §§ 507(a)(1), 503(b)(1)(B). By a stroke of the pen, BNY claims to have eliminated that administrative expense priority. And by purporting to immunize the trustee from obligations to pay federal income tax, BNY's Plan permitted the creditors (especially BNY itself) to obtain a windfall without competition from the Government's claim for federal income taxes. The estate, swollen

by the retention of moneys otherwise due the federal government for taxes, yielded itself readily to such payments to the creditors in lieu of those due the public Treasury. To compound this, BNY's unlawful taking and retention of the $27 million credit may well leave the trust with insufficient funds with which to pay its taxes, assuming that the Court agrees with our and the Solicitor General's position in the tax case, Nos. 90-1361 and 90-1484.

The Court need not countenance this manifest injustice merely because of "considerations of finality" not imposed by the Constitution or by any statute. Compelling considerations of justice, in fact, lead to the opposite conclusion.

CONCLUSION

This petition for a writ of certiorari should be granted.[24]

Respectfully submitted,

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

STUART E. SEIGEL
KENT A. YALOWITZ
65 East 55th Street
New York, New York 10022
(212) 750-5050

Attorneys for Petitioners Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

April 1991

[24] In light of our and the Solicitor General's petitions for certiorari in the tax case (Nos. 90-1361 and 90-1484) and the interconnection of this case with those petitions, the Court may wish to hold action on this petition in abeyance pending its decision on the tax case petitions if certiorari is granted as to them.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-5770

IN RE HOLYWELL CORPORATION, *et al.*, DEBTORS.

HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN [ASSOCIATES], THEODORE B. GOULD,

Plaintiffs-Appellants,

v.

BANK OF NEW YORK and FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(January 9, 1991)

[Judgment Entered January 9, 1991]

Before: KRAVITCH and ANDERSON, *Circuit Judges*, and LYNNE*, *Senior District Judge*

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

This appeal is one of a seemingly unending stream of appeals arising out of the Chapter 11 bankruptcies of several debtors involved in the Miami Center project. The general background of the project is described in our previous opinions and will not be repeated here. *See, e.g., Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S. Ct. 69 (1988).

In this appeal, appellants challenge a $27 million credit received by the Bank of New York toward the purchase price of the project. This credit was part of the now substantially consummated plan of reorganization, and appellants' challenge thus is moot. *See id.* This appeal therefore is DISMISSED.

Appellee Bank of New York has requested that this court assess double costs and reasonable attorneys' fees against appellants and their attorneys for bringing a frivolous appeal. Because this appeal, like several of the others brought by the appellants that we decide today, is wholly lacking in merit, we find this to be a close question. In view of all of the circumstances, however, including the fact that appellants were not put on notice in the courts below that their arguments are frivolous, we decline to assess double costs and reasonable attorneys' fees in this case.

DISMISSED.[1]

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[1] All pending motions, other than the motion to dismiss, are denied.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-151-CIV-ARONOVITZ

IN RE HOLYWELL CORPORATION, *et al.*, DEBTORS.

HOLYWELL CORPORATION, *et al.*,
Appellants,
v.
FRED STANTON SMITH and THE BANK OF NEW YORK,
Appellees.

On Appeal from the United States Bankruptcy Court
for the Southern District of Florida

[Filed July 21, 1988]
[Judgment Entered July 21, 1988]

FINAL ORDER VACATING DECLARATORY JUDGMENT ON COUNT III OF ADVERSARY COMPLAINT

ARONOVITZ, *District Judge*:

I. Introduction

Appellants Holywell Corporation, et al. ("Holywell") bring this appeal challenging the bankruptcy court's December 18, 1987 Order finding that appellee, The Bank

of New York ("BONY"), "was not an undersecured creditor," and entering judgment in favor of trustee Fred Stanton Smith ("Smith") on Count III of his adversary complaint. In Count III, Smith sought and received a declaratory judgment that BONY was not undersecured, and that therefore it was "entitled to receive credit against purchase price at closing for post-petition interest." Pursuant to the Amended Consolidated Plan of Reorganization (the "Plan"), BONY obtained a $27,050,115.02 credit towards the purchase price of the Miami Center project which represented interest accrued post-petition.

II. Procedural History

Appellants are debtors who had been involved in the development of the Miami Center project, a modern thirty-five story hotel and office building structure located on the bay in downtown Miami. BONY financed the project's construction and was the principal creditor. Debtors filed voluntary petitions for bankruptcy after the mortgage fell into default. After the bankruptcy court confirmed the Plan of reorganization, it required debtors to post a $140 million bond to stay implementation of the Plan during an appeal to the District Court. Debtors appealed this bond requirement to the District Court, which reduced the amount of the bond to $50 million and gave debtors an additional period of time in which to post bond.

Debtors appealed the $50 million bond setting to the Eleventh Circuit, which dismissed debtors' appeal for lack of jurisdiction. Debtors failed to post the $50 million bond, and beginning on October 11, 1985, the trustee and BONY began to implement the Plan. BONY's designee, a land trust, received title to the Miami Center project, its furniture, fixtures and equipment. In exchange, BONY released its judgment lien and $30 million of cash

collateral, and payed about $13.6 million in additional consideration.

Debtors appealed to the District Court both the bankruptcy court's order confirming the Plan and an earlier order consolidating the debtors' estates. The Court concluded that the appeals before it were not moot, but upon BONY's application certified to the Eleventh Circuit the issue of whether debtors' appeal was moot. The Eleventh Circuit declined to accept this certification. The District Court remanded the appeal to the bankruptcy court for further findings of fact and conclusions of law.

The bankruptcy court entered detailed findings and affirmed its previous rulings in all respects. On appeal, the District Court did not revisit the mootness issue, instead ruling on the merits, affirming the bankruptcy court's orders of consolidation and confirmation. Debtors proceeded with an appeal to the Eleventh Circuit, which on June 29, 1987 dismissed the appeal as moot due to the effective consummation of the Plan of reorganization. 820 F.2d 376 (11th Cir. 1987). Debtors petitioned for rehearing, and on September 8, 1987 the Eleventh Circuit concluded on rehearing that it had erred in stating that the Miami Center project was sold to a good faith purchaser. 826 F.2d 1010 (11th Cir. 1987). Nonetheless, the court held that this error did not affect the court's prior holding, and denied the petition in all other respects.

On a further petition for rehearing and suggestion for rehearing en banc, the Eleventh Circuit, on March 10, 1988, rejected its two earlier opinions and concluded for the first time that the *District Court* should have dismissed the appeal to it as moot. 838 F.2d 1547 (11th Cir. 1988). "Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand." *Id.* at 1553.

III. The present dispute

Trustee Smith initiated this adversary action in the bankruptcy court due to his concern over a statement in the bankruptcy court's original confirmation order dated August 8, 1985: "The Bank of New York, the major creditor, whose claim is undersecured . . . ." Smith's concern is understandable, as he does not dispute Holywell's contention that under Section 506(b) of the Code, a post-petition interest credit is *only* appropriate for an oversecured creditor. *See United Sav. Ass'n* v. *Timbers of Inwood Forest*, 108 S.Ct. 626, 631 (1988). It is also undisputed that BONY applied a $27,050,115.02 credit towards the purchase price of the Miami Center project representing post-petition interest.

While Holywell did not initiate this dispute, it strenuously takes issue with the bankruptcy court's two recent findings, first that BONY was not undersecured, and second that BONY was "entitled to receive" the $27 million credit. In addition to the original bankruptcy court order, Holywell has directed the Court's attention to other evidence on the security issue, in particular statements made by both BONY's counsel, Mr. Vance Salter, Esquire, and Smith's former counsel, Mr. Irving Wolff, Esquire.

At a hearing held before this Court on January [10], 1986, the Court inquired of Salter whether BONY had taken all relevant factors into account in drawing its conclusion that "the bank is undersecured?" Mr. Salter responded "Yes indeed." In fact, Salter was addressing the very same statement in the bankruptcy court's order which referred to BONY as an undersecured creditor.

Secondly, Wolff and appellees are defendants to an action pending in the United States District Court for the Western District of Virginia, *Twin Development Corporation v. Fred Stanton Smith, Bank of New York, and Irving Wolff*, 87-0037-C (W.D. Va.). In certain answers

to interrogatories propounded to Wolff in that case, he reveals that the trustee herein sought and obtained indemnification from BONY "because the Confirmation Order found the Bank to be an undersecured creditor, and in the closing adjustments the Bank took credit for post-filing interest in the amount of $27,050,115." This indicates that the trustee sought to protect his position due to concern over the credit for post-petition interest provided for in the Plan of reorganization.

IV. The Eleventh Circuit

The bankruptcy court entered its declaratory judgment order after the Eleventh Circuit issued its second opinion dismissing as moot the debtors' challenge to the Plan. This second opinion modified the Eleventh Circuit's first opinion, but nonetheless dismissed the appeal as moot. The Eleventh Circuit had concluded that the debtors' failure to obtain a stay pending appeal rendered the appeal to the Eleventh Circuit moot because the court could not order relief without compromising the integrity of the sale of the property. 820 F.2d at 376. As the Plan of reorganization had already been substantially consummated, the court found that it could not grant "effective judicial relief." 820 F.2d at 380.

The Eleventh Circuit's final order, issued upon a suggestion for rehearing en banc, expanded and elaborated on the mootness issue. The court essentially affirmed the reasoning in its earlier decision that the sale of the Miami Center project rendered substantive challenges to the Plan moot. But for the first time the Eleventh Circuit held that this mootness principle meant that the District Court itself should have decided Holywell's appeal on mootness grounds, instead of reaching the merits.

The Eleventh Circuit held that mootness precluded the District Court from reaching the merits although the debtors did not seek to get the property back. 838 F.2d

at 1555. The court rejected debtors' request to have the Miami Center project revalued to a higher figure, and to have a realignment of certain priorities and claims, because "the consequences of what debtors seek strike at the sale to the bank and the reorganization plan as a whole." *Id.* at 1556.

V. A premature ruling

The bankruptcy court would have done well to wait until the Eleventh Circuit issued a mandate on the *Miami Center* decision. The final opinion by the Eleventh Circuit makes it crystal clear that it is no longer appropriate for the bankruptcy court to re-visit the substantive merits of the confirmed Plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the "piecemeal dismantling" of the Plan. 838 F.2d at 1555. Consequently, the question of whether BONY was "entitled" to obtain the $27 million credit is no longer subject to adjudication.

Whether or not BONY was "entitled" to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan. The Eleventh Circuit has declared that "[t]he bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified . . . ." 838 F. 2d at 1557. The Plan unmistakably provided for BONY to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for "[i]nterest to October 9, 1985."

Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered. BONY has filed a motion to dismiss this

appeal as moot, which relies upon the reasoning in the Eleventh Circuit's third opinion. But granting this motion would leave the bankruptcy court's declaratory judgment untouched, something which is inappropriate given the mootness doctrine.

Thereupon, BONY's motion to dismiss this appeal as moot be, and the same is, hereby DENIED. The bankruptcy court's December 18, 1987 Order entering judgment on Count III of Smith's adversary complaint be, and the same is, hereby VACATED. Given this disposition, this case is REMANDED to the bankruptcy court with directions to dismiss Count III of the trustee's adversary complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of July, 1988.

/s/ Sidney M. Aronovitz
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. Proc. No. 87-0523-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

FRED STANTON SMITH, as TRUSTEE OF THE
MIAMI CENTER LIQUIDATING TRUST,
Plaintiff,

v.

THE BANK OF NEW YORK,
HOLYWELL CORPORATION, MIAMI CENTER CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES and THEODORE B. GOULD,
Defendants.

Proceedings in Chapter 11

[Filed December 18, 1987]

ORDER ON DEBTORS' "UNDERSECURITY" CLAIM

SIDNEY M. WEAVER, *Bankruptcy Judge*:

THIS ADVERSARY PROCEEDING was tried on December 8, 1987. Count III of the Complaint prays for a declaratory judgment on the Debtors' claim that The Bank of New York (the "Bank") was an undersecured creditor and therefore not entitled to a credit for post-petition interest when the Bank purchased the Miami Center Project.

Having reviewed the pleadings, the prior findings establishing the value of the Bank's collateral and the amount of the Bank's lien, the provisions of the confirmed plan, and applicable law, and having heard argument of counsel, it is hereby ORDERED AND ADJUDGED that:

1. The Bank was not an undersecured creditor in these reorganization proceedings.

2. As to Count III of the Liquidating Trustee's Complaint, judgment is therefore entered in favor of the Liquidating Trustee and the Bank, and against the claims of the Debtors.

SO ORDERED in Chambers at Miami, Florida, this 18th day of December, 1987.

/s/ Sidney M. Weaver
United States Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

Proceedings in Chapter 11

[Filed August 8, 1985]

CONFIRMATION ORDER

THOMAS C. BRITTON, *Bankruptcy Judge*:

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Al-

though conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B.R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better. The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditors' committees has elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C.P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29. (C.P. No. 614). There was an addendum to that stipulation on the same day. (C.P. No. 564) A second addendum was agreed upon on May 30 (C.P. No. 709(c)), and a third addendum was agreed upon on July 30. (C.P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C.P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C.P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C.P. No. 546) the cram

down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED in Miami, Florida this 8th day of August 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

Proceedings in Chapter 11

[Filed December 31, 1984]

ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

THOMAS C. BRITTON, *Bankruptcy Judge*:

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Proper-

ties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are termi-

nated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31st day of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge